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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAUL RIVAS HERRERA, Defendant and Appellant.	F061301 (Fresno Sup. Ct. No. F09905343) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On September 28, 2010, the Fresno County District Attorney filed a first amended information in superior court charging appellant Raul Rivas Herrera with one count of forcible rape (Pen. Code,[1] § 261, subd. (a)(2)) committed in the course of a first degree burglary (§ 667.61, subd. (a)) and one count of first degree residential burglary (§§ 459, 460, subd. (a)).

On September 29, 2010, jury trial commenced.

On October 6, 2010, the jury returned a verdict finding appellant guilty of forcible rape but was unable to reach a verdict on the burglary count or special allegation as to the rape count. The court declared a mistrial as to the burglary count and the special allegation and granted the prosecution's motion for dismissal of that count and allegation.

On November 4, 2010, the court sentenced appellant to the upper term of eight years in state prison. The court awarded 480 days of custody credits, imposed a restitution fine of $1,600 (§ 1202,4, subd. (b)), and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45).

On November 4, 2010, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Introduction

Appellant was convicted of the rape of M., the 34-year-old niece of his former girlfriend, Maria Q. The relationship between Maria Q. and appellant ended in 2008 because Maria Q.'s sons and appellant disliked one another.

Events Leading to the Charged Offense

In September 2009, M. went to Maria Q.'s Kerman home to stay over and to attend the Kerman Harvest Festival. On the evening of September 13, 2009, Maria Q.,

[1] All further statutory references are to the Penal Code unless otherwise stated.

M., and M's two sisters, went to the festival. They encountered appellant at the festival. He followed them and tried to talk to Maria Q., but Maria Q. wanted him to go away. Appellant attempted to speak with Maria Q. for a period of time. Although police were patrolling the area, the four women did not contact officers, and appellant eventually went away. One of M.'s sisters heard appellant say in an angry manner that they were "gonna get it."

M. and Maria Q. left the festival a little before midnight. Both women went to M.'s cousin's house for a visit. Maria Q. departed for home after a few minutes at the cousin's house. M. left the cousin's house for the Maria Q. home at about 1:00 a.m. M. and Maria Q. shared a bed, their custom when M. visited Maria Q.'s home.

The Charged Offense

At 5:00 a.m., M. awakened and found someone on top of her engaged in intercourse. M. had gone to bed wearing a pair of jeans, but she was no longer wearing them. M., who stood 5 feet three inches tall and weighed 122 pounds, tried to push the man off of her for what "seemed [to be] five to seven minutes." She said she repeatedly shouted and yelled, "Who are you?" and "Get off." M. said appellant was engaged in intercourse with her, but she did not know whether he ejaculated. Although M. shouted, Maria Q. apparently did not hear her, even though she was asleep on the same bed. M.'s cousin, Daniel, and Daniel's friend, Rico, were sleeping on couches in the adjacent living room, but they did not hear her either. As the man engaged in intercourse, he instructed M., "Shhh, be quiet." The man eventually got off of M.

M. grabbed her pants from the bed, ran out of the bedroom, and went into a bathroom. On the way to the bathroom, she passed by her cousin, Daniel, who was asleep on one couch, and her sister's boyfriend, "Rico", who was asleep on another couch. M. said "freaked out" and was hysterical and crying in the bathroom. She composed herself after a few minutes, went back to the bedroom, and turned on the light

to determine the identity of the male in the bed. M. said her aunt was lying on the bed near the headboard, which was located against the bedroom wall. M. saw appellant lying on the covers of the bed.

M. started screaming and hitting the appellant. Her screams awakened her aunt, Daniel, and Rico. M. said she had been asleep in the bed with her head at the foot of the bed, and that appellant had been positioned the same way. When she returned from the bathroom, appellant's head was near Maria Q.'s head, at the top of the bed. Maria Q. said she heard M. scream, "Tia, Tia!" and awakened. Maria Q. said she saw M. strike appellant, who was on the floor looking for his shoes. Maria Q. ran to the bedroom door and closed it to keep Daniel and Rico from entering the bedroom to attack Herrera. Maria Q. also testified she opened the door to check on her son and saw Daniel and Rico still resting on the living room couches. At some point, appellant left Maria Q.'s home through the bedroom window.

M. told her aunt what appellant had done to her. Maria Q. walked to the nearby Kerman Police Station and also telephoned the police dispatch. While Maria Q. went for the police, M. started to run to her mother's home, which was located about a block away from Maria Q.'s home. Rico ultimately gave M. a ride to her mother's home. M. gathered her possessions together at her mother's home and then returned to Maria Q.'s home to gather the rest of her belongings. She intended to collect all of her possessions and then drive to her own home in Fresno. The Kerman Police were present when M. and Rico returned to Maria Q.'s home.

At 6:00 a.m., Maria Q. met with Kerman Police Officer Sandra Mendoza at the police station. Officer Mendoza accompanied Maria Q. back to her residence. One person was asleep in the living room when Mendoza arrived. M. returned while Mendoza was present. M. was agitated and Mendoza took her to the police station for an interview. After the interview, Officer Mendoza summoned an ambulance to take M. to

Community Regional Medical Center for examination. Mendoza said she spent several hours with M. at the hospital. Mendoza did not see any signs that M. was intoxicated but did say her demeanor alternated between anger and tears. Mendoza testified that M. was "pretty verbal about telling me what was going on, then she would just shut down, cry, and not answer my questions."

At 6:30 a.m. that same day, Kerman Police Officer Tom Chapman photographed some shoe prints in the soil under Maria Q.'s bathroom window. Officer Chapman found a cell phone, sandal, and shoe prints under the south window of Maria Q.'s bedroom and a size 11 shoe inside Maria Q.'s bedroom. The shoe prints outside the south bedroom window and the bathroom were consistent with the shoe Chapman found inside the bedroom.

Appellant was placed under arrest on September 14, 2009. Kerman Police Officer Ron Gaxiola collected the underwear appellant had been wearing at the time of arrest and booked that underwear into evidence. Officer Gaxiola also collected several cheek swabs from appellant.

Scientific Evidence

A. M.'s Vaginal Swabs

At 6:57 a.m. on September 13, 2009, M. met Karen Reid at the Community Regional Medical Center emergency room. Reid testified that she was a registered nurse and a SAFE R.N. (sexual assault forensic examiner). Reid conducted an interview with M. and collected four swabs from M.'s vagina and cervix.[2] Three swabs were used to prepare slides. Reid examined one slide and saw no sperm. Reid also collected reference

[2] Reid did not identify any trauma to M.'s body during the collection process. However, at trial, M. said she felt "a lot of pain" in her vaginal area. M. testified she had consensual sexual intercourse a few days prior to the incident and never felt pain during consensual intercourse.

samples from M., including hair, saliva, urine, and blood. The slides, the four swabs, and the reference samples were sent to the crime lab.

Kiffin Nelson, a criminalist at the DOJ Fresno Regional Laboratory, received the sexual assault kit with the samples collected by Reid. First, Nelson stained and examined the slides to determine whether any sperm were found in M.'s vaginal area. Nelson observed epithelial cells, but no sperm. Next, Nelson tested the vaginal swabs for the presence of acid phosphatase, a component in seminal fluid. All four swabs were negative. Third, Nelson conducted a differential extraction with the material on two swabs to separate the sperm DNA from the non-sperm DNA. She used an enzyme intended to break open the vaginal epithelial cells, but leave any sperm intact. At this point, she examined the results of one swab on a slide and found what appeared to be a single sperm. A slide of the second swab revealed two sperm.

Nelson extracted the DNA from the vaginal swabs into sperm and non-sperm fractions. When she tested the sperm fraction, she determined that very low levels of male DNA (and high levels of female DNA) were present. In this situation, technology that specifically targets the Y chromosome, which is present only in males, can be used to analyze the low levels of male DNA. This technology tests for short tandem repeats (STR's) on the Y chromosome, ignoring any female DNA in the mixture.

Nelson arranged for a senior criminalist at the DOJ Fresno Regional Laboratory, Lora Bailey-Van Houton, to test the sperm fraction with "STR Y typing." When Bailey-Van Houton tested the sperm fraction, she determined that the sample contained DNA from two males, and appellant was not one of them. He was eliminated as a donor of sperm DNA. Bailey-Van Houton explained that the test was sensitive enough to detect sperm that had been present for up to a week or so.[3]

[3] Bailey-Van Houton explained that although the vaginal swabs had tested negative for acid phosphatase, enough sperm were present to be detected by the more

When Bailey-Van Houton tested the non-sperm fraction of the vaginal swab DNA, which was presumed to contain mostly female DNA, she determined that low levels of male DNA were present. She found that the genetic profile of the male DNA was consistent with appellant's genetic profile, which was expected to occur randomly in one in 1,047 Caucasian males and one in 561 Hispanic males.[4] Bailey-Van Houton explained that the non-sperm male DNA could have come from saliva, blood, or seminal fluid (such as in pre-ejaculate). If during intercourse the male did not ejaculate, or had undergone a vasectomy, sperm would not likely be found with a vaginal swab.

B. Appellant's Underwear

Nelson also tested appellant's underwear. She swabbed the inside of the crotch and waistband. She examined a slide and saw no sperm, so she proceeded to extract the DNA from the swab. The DNA was analyzed at 15 different loci with STR testing. The results established that the sample was a mixture of at least two people, although in her opinion it contained only two. As expected, one genetic profile in the mixture was consistent with appellant's genetic profile. The other genetic profile was consistent with M.'s genetic profile, and therefore she could not be eliminated as a contributor of that DNA. That profile was expected to occur randomly in one out of 6.8 quadrillion African-Americans, one out of 200 quintrillion Caucasians, and one out of 390 trillion Hispanics.

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sensitive DNA testing. Because sperm were found, the seminal fluid test results were incorrect.

[4]There appears to be an omission in the transcript, probably estimating the occurrence in the African-American population.

The increased frequency of this profile was due to the fact that the test analyzes only the Y chromosome, which is passed on intact and unchanged from father to son.

(The population of the earth is approximately 6.5 billion people.) Thus, it was extremely unlikely that the DNA came from someone other than M.[5]

Defense Evidence

Ruth Ballard, Ph.D., testified that she was a professor of biological sciences at California State University, Sacramento, the DNA biology advisor for the Forensic Science Graduate Program at the University of California at Davis, and an adjunct professor of environmental toxicology at U.C. Davis. Ballard reviewed the work done by Nelson and Bailey-Van Houton. Ballard agreed with Nelson that the second genetic profile in the mixture from appellant's underwear was not a complete profile. She noted that the mixture contained a large amount of appellant's DNA, as would be expected from his own underwear, and a small amount of another person's DNA.

As for the vaginal swab DNA, Ballard explained that, given the low levels of DNA that were found, the acid phosphatase test could have been negative even though seminal fluid was actually present.

On cross-examination, Ballad testified that she did not disagree with the findings of either Nelson or Bailey-Van Houton. Ballard stated that Nelson's report on the underwear DNA was correct and proper.

Alan Barbour, Ph.D. testified that he was a forensic alcohol supervisor and associate laboratory director at Central Valley Toxicology in Clovis, California. Central Valley Toxicology tested M.'s blood and urine samples. According to Dr. Barbour, the blood sample showed a 0.07 blood-alcohol content at 10:30 a.m. on the morning after the incident. Dr. Barbour testified that a 0.07 blood-alcohol level would have required an individual to consume, at a minimum, "about eight regular beers or the equivalent in

[5] Nelson explained that her profile frequency calculations took into account the inability to discern a complete profile for this genetic profile due to its being a mixture.

some other form of alcohol." Dr. Barbour also said "[f]our 24-ounce 5-percent beers would get you awful close [to the 0.07 blood-alcohol level at 10:30 a.m.]."

DISCUSSION

SUBSTANTIAL EVIDENCE SUPPORTED THE JUDGMENT OF CONVICTION OF RAPE

Appellant contends there was no substantial evidence that he raped M. He contends her testimony about the offense, which constituted the prosecution's evidence of lack of consent, was "inherently unbelievable" and "not reasonable, credible, … or [of] solid value."

A. Standard of Review

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, original italics.) An appellate court

"do[es] not reweigh the evidence ...." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.)

"By definition, 'substantial evidence' requires *evidence* and not mere speculation." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002, quoting *People v. Morris* (1988) 46 Cal.3d 1, 21, original italics.) " '[W]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics omitted.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In conducting an examination of the sufficiency of the evidence, we review "'the entire picture of the defendant put before the [trier of fact] and [we] may not limit our appraisal to isolated bits of evidence selected by the respondent.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) " '[I]t is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' [Citation.]" (*Ibid*.)

In *People v. Young* (2005) 34 Cal.4th 1149, 1181, the Supreme Court stated: "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." "The inherently improbable standard addresses the basic content of the testimony itself - i.e., could that have happened? – rather than the apparent credibility of the person testifying." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Huston* (1943) 21 Cal.2d 690,

693, disapproved on another point in *People v. Burton* (1961) 55 Cal.2d 328, 351-352.) "While an appellate court can overturn a judgment when it concludes the evidence supporting it was 'inherently improbable,' such a finding is so rare as to be almost nonexistent." (*People v. Ennis, supra*, 190 Cal.App.4th at p. 728.) An "inherent improbability claim ... based entirely on comparisons, contradictions and inferences ... amounts to nothing more than an attack on witness credibility, and cannot be the basis for a reversal of the judgment on appeal." (*Id*. at p. 725.)

"Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable." (§ 1127b.) The weight, effect, and value of the opinions of the experts are matters for the jury to determine. They have the right and duty to weigh such evidence in conjunction with all of the facts and circumstances of the case. (*People v. Coleman* (1942) 50 Cal.App.2d 592, 597.)

B. <u>Substantive Law of Rape</u>

Rape is a general intent offense. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022.) Forcible "[r]ape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator … [¶] … against the person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another." (*People v. Rundle* (2008) 43 Cal.4th 76, 138, citing section 261, subdivision (a)(2), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Lewis* (2009) 46 Cal.4th 1255, 1290.) " '[A]gainst one's will' means 'without the consent of the alleged victim.' " (*People v. Lee* (2011) 51 Cal.4th 620, 634, fn. 10.) "The essential guilt of rape consists in the outrage to the person and feelings of the victim

of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263.) Ejaculation is not an element of rape. All that is required is sexual penetration, however slight. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1079.)

C. Analysis

An appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) An appellant who contends that some particular finding is not supported is required to set forth in her or her brief a summary of the material evidence on that issue. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Appellant makes five assignments of error in this case. We address each in turn.

1. Physical Impossibility

Appellant contends M.'s testimony described events that were physically impossible:

> "[M. testified] that she fought Herrera for five to seven minutes, while yelling at him, without waking [Maria Q.] who was sleeping in the same bed only inches away …. There was no evidence that [Maria Q.] was unable to waken from the commotion and yelling next to her because she had passed out from alcohol – she had had only four to five beers that night. [Citations.] In fact only minutes later, when M. was yelling at and hitting Herrera after returning from the bathroom, [Maria Q.] woke up right away. [Citation.] It is not possible that [Maria Q.] did not waken during the alleged rape itself. [¶] Nor did M.'s cousin Daniel and his friend Rico wake up. [Citation.] Even though it was a small house [citations], and M. supposedly was yelling at Herrera for five to seven minutes, neither of them was roused from their sleep."

" ' "To warrant the rejection of the statements given by a witness who has been believed by a [finder of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment …." ' " That is because " ' "it is the exclusive province

of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" ' [Citations.] Further, a jury is entitled to reject some portions of a witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Here, the jurors could have made a number of inferences. For example, they could have surmised that Maria Q., Daniel, and Rico consumed more alcoholic beverages than Maria Q. testified to, or that the beverages they did consume had a far greater impact on their ability to awaken than Maria Q. alluded to or implied during her testimony.

2. Removal of M.'s Jeans

Appellant contends "equally implausible was M.'s testimony that she went to bed wearing a pair of jeans, but that Herrera had taken off her jeans without her awakening. [Citations.]" Appellant points out that M. testified "when she went to bed at 1:00 a.m. she could feel a 'buzz' but was 'not wasted,' and that at 5:00 a.m., when [the] rape allegedly occurred, she was 'completely sober.' [Citations.]"

Dr. Alan Barbour testified an individual would have to consume eight normal sized beers or four 24-ounce beers before going to sleep at 1:00 a.m. in order to have a blood-alcohol level of 0.07 as M. did at 10:30 a.m. on September 13, 2009. Based on Dr. Barbour's testimony, the jury could have reasonably concluded that M. consumed more alcohol than she alluded to during her testimony, and that the effect of the alcohol was to dull her senses and make her unaware that her jeans were being removed as she slept.

3. M.'s Recognition of Appellant

Appellant contends M.'s explanation of how she recognized him is not reasonable or credible:

> "Before the harvest festival, M. had seen Herrera only twice – once on an errand at Home Depot, and on a few occasions at church. [Citations.] She had had no other contact with Herrera. [Citations.] Yet, she claimed that in

> the dark bedroom she was able to recognize Herrera on top of her by touching his hair and his chest. [Citations.] Given her extremely limited interaction with Herrera, her claim that she recognized his hair and chest in the dark is incredible."

Given the strong evidence of appellant's presence at Maria Q.'s home – as well as scientific evidence that overwhelmingly supported the conclusion that appellant's non-sperm DNA was inside M.'s vagina, and M.'s DNA was inside appellant's underwear – appellant's challenge to M.'s ability to recognize and identify him in Maria Q.'s bedroom does not compel a different result. Reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Jurors are the exclusive judges of the credibility of witnesses and are the judges of the effect or value of the evidence addressed to them. (*People v. Wilder* (1957) 151 Cal.App.2d 698, 704-705.)

4. M.'s Truthfulness

Appellant contends M. was untruthful because she "insisted at trial that she had had only three to four beers all night [citations], but at 10:30 a.m. the next morning her blood alcohol content was 0.07 [percent]. [Citations.] The undisputed testimony of a forensic scientist was that M. had had eight to 10 beers. [Citations.]"

We review the evidence in the light most favorable to the respondent. (*People v. Johnson, supra*, 26 Cal.3d at p. 577.) "In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) Conflicts and even testimony that is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which such a determination depends. (*People v. Janisse* (1958) 162 Cal.App.2d 117, 122.)

The jury could have reasonably rejected M.'s testimony with respect to the quantity of alcohol she consumed but accepted other portions of her testimony inculpating appellant in the charged offenses.

5. Purported Fabricated Evidence

Appellant argues:

> " … M. testified that she was in a 'lot of pain' in her vagina when the SAFE nurse took vaginal swabs during the medical examination [citations], but the SAFE nurse saw no signs of trauma or lacerations to M.'s vagina or cervix. [Citations.] Her claim that she was in a lot of pain was simply another fabrication to bolster her story."

Under California law, it is the province of the trier of fact to weigh the evidence, judge the credibility of witnesses, and resolve inconsistencies and contradictions in the testimony. (*People v. Knighton* (1967) 250 Cal.App.2d 221, 231; *People v. Hrisoulas* (1967) 251 Cal.App.2d 791, 796.) Here, the jury could have reasonably accepted the testimony of M. and rejected that of the SAFE nurse, or alternatively, determined that M. did experience pain even though the SAFE nurse did not see any visible signs of trauma to M.'s body.

6. Conclusion

" 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' (*People v. Jones* (1990) 51 Cal.3d 294, 314 [].)" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) An "inherent improbability claim ... based entirely on comparisons, contradictions and inferences ... amounts to

nothing more than an attack on witness credibility, and cannot be the basis for a reversal of the judgment on appeal." (*People v. Ennis*, *supra*, 190 Cal.App.4th at p. 725.)

Appellant's contention amounts to an attack on witness credibility and, under the authority of *Ennis,* cannot be the basis for a reversal of the judgment on appeal.

DISPOSITION

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

_____
Kane, Acting P.J.

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Detjen, J.